United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

76-4049

United States Court of Appeals
FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and WESTERN UNION INTERNATIONAL, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

—and—

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
XEROX CORPORATION,
HAWAIIAN TELEPHONE COMPANY,
AMERICAN PETROLEUM INSTITUTE,
Intervenors.

PETITION FOR REVIEW OF A REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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REPLY BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

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REPLY BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

Petitioner RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globcom") submits this brief in reply to the submissions of the Federal Communications Commission and four intervenors which seek to justify the Commission's Report and Order of January 19, 1976 in its Docket No. 19558 (JA 1-9).

That Order held it to be in the public interest to allow Intervenor American Telephone & Telegraph Company

("AT&T") to use the circuits of its overseas public message telephone service ("MTS") to transmit record communications between foreign points and the domestic MTS system. The Commission so ruled despite the readiness, willingness and ability of RCA Globcom and the other petitioning international record carriers ("IRCs") to furnish competitively, on equal or better terms, all of the public's needs for overseas record services, including services which originate or terminate in that unique, Government-franchised distribution monopoly—the domestic MTS system.

All that the IRCs require to serve the public's needs for such communications services is something which they sought below and which they might well have received if the Commission had comprehended the plain import of the record which the parties put before it. That is a Commission Order, pursuant to Communications Act § 201, 47 U.S.C. § 201 (1970), directing AT&T to establish for record calls a full carrier interconnection between the broadband analog circuits of the domestic MTS system and petitioners' networks of comparable broadband analog circuits linking the United States and overseas points.*

Proponents' False Issues

The Order's proponents assert, repeatedly and in a variety of different guises, two propositions as if they were in dispute and dispositive. *First*, they say, domestic telephone subscribers should have the capacity to send and

*RCA Globcom believes, for the several reasons stated in its principal brief, that the Commission's failure to apprehend the availability through the petitioning IRCs of a full alternative to the overseas service contemplated by AT&T requires, at the very least, a reversal of the Commission's decision so that the agency may, in further proceedings, assess the options which, in fact, exist. This is true whether or not the Court feels able, in the present posture of this case, to mandate the interconnection Order which the Commission has thus far declined to issue.

receive conveniently, through their telephone outlets, facsimile, data, and other record calls to and from foreign overseas points.* *Second*, they say, the Commission may exercise discretion in regulating the nation's communications practices, and no statute categorically excludes AT&T from the overseas record service. These contentions are simply not responsive to the challenge which the IRCs have directed against the Order below.

The dispute between AT&T and the petitioning IRCs *never* has been about the desirability of providing domestic telephone subscribers with an overseas record capability.** It *always* has been about (a) the identity of the carrier(s) whose analog circuits should carry record traffic between the domestic MTS system and the domestic circuits of the national carriers which operate in foreign countries and (b) why the Commission ought to select the IRCs for the trans-oceanic role. The unique, Government-franchised domestic MTS system is an extraordinary distribution mechanism. Its availability to the IRCs would open the

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* By this stage of the briefing, the Court will appreciate that there is considerable uncertainty about what to call the service which implements this capability. The semantic confusion may well have contributed to the analytic muddle below. There is, so far as we can tell, no simple, generally accepted word of common speech which describes the generic service at issue. Popular usage has not kept pace with the advance of technology.

"DATA-PHONE", a federally registered service mark, and "DATEL" are tradenames which AT&T and the petitioning IRCs apply, respectively, to their present offerings corresponding, to some extent, to the generic service in suit.

** The Order's proponents would imply that the IRCs oppose "progress". But the Luddite in this proceeding, if there be one, is AT&T. Its brief incautiously admits at one point that the record contains "substantial evidence" showing that the IRCs offered a service "superior" to AT&T's "both initially and over the long term." (AT&T Br. at pp. 14-15) Yet AT&T resisted below, and it still resists, the full carrier interconnection which alone would make the IRCs' "superior" capability fully and easily accessible to telephone subscribers.

way to an unprecedented improvement in the foreign communications capability of the American people. Its denial to the IRCs under the terms of the present Commission Order would lay the foundation for AT&T's domination of the competitive overseas record industry.

As for the proponents' second proposition, the IRCs attack, not the existence of discretion in the Commission, but the Commission's reversible misuse of that discretion. The FCC has not fully and fairly evaluated the IRCs' offer to provide to domestic telephone subscribers, through interconnection, an overseas service fully equivalent to that proposed by AT&T. The Commission apparently did not realize that such an alternative existed. Thus it has denied to the IRCs the reality of a hearing in any form on their fundamental claim.

The Commission also has failed (1) to explain adequately its disregard of the so-called *TAT-4* decision, *American Tel. & Tel. Co.*, 37 F.C.C. 1151 (1964); (2) to analyze the antitrust implications of AT&T's extension of its monopoly power to the currently competitive overseas record communications field; and (3) to conduct a factual investigation appropriate to a proceeding of the significance and complexity of Docket No. 19558.

These defects in the Commission's functioning below raise the actual issues of the present review proceedings. As we show in the pages following, the Order's proponents can provide no valid excuses for these reversible errors. Nor can they avoid, by reason of jurisdictional or procedural arguments, the necessity of facing them.

POINT I

The Commission's Selection of AT&T to Carry Record Traffic Between the Domestic MTS and Overseas Points Is Reviewable

The petitions for review of RCA Globcom and the other IRCs challenge the Commission's selection of AT&T as a carrier eligible to provide record service between the domestic MTS and overseas points. The Commission acknowledges, albeit reluctantly, the Court's jurisdiction to review this decision (FCC Br. at p. 22), but intervenors AT&T, Xerox Corporation and American Petroleum Institute do not.

They argue that AT&T's actual debut in the overseas record service must await a further agency ruling upon AT&T's applications filed pursuant to Communications Act § 214, 47 U.S.C. § 214 (1970), *as amended*, (Supp. IV, 1974).* In their view the Commission has taken no "final" agency action within the meaning of 28 U.S.C. § 2342 (1) (Supp. IV, 1974) and Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (1970), and thus nothing reviewable is properly before the Court.

AT&T's principal "authority" for this proposition, *Radio Relay Corp.* v. *FCC*, 409 F.2d 322 (2d Cir. 1969) (see AT&T Br. at pp. 46-47), disposes of it. In that case this Court reviewed on the merits a Commission Order which "allocat[ed] . . . previously unassigned high radio frequencies for use . . . in one-way paging service[s]". (*Id.* at 324) The Court did so although it recognized that the carriers affected by the Order still were required to file Section 214 applications before making any specific uses of the frequencies allocated by the Order. The Court wrote:

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* Such applications now pend before the Commission's Common Carrier Bureau in a new docket (File No. I-P-C-12) convened since the Commission's Report and Order of January 19, 1976. The latter Order explicitly "terminated" Docket No. 19558. (JA 9)

> "[T]he frequency allocations created by the Rule do not of themselves give any carrier the right to operate on these bands. They merely make the channels available to a prospective licensee upon a specific application and are allocated only after a determination by the Commission that permitting the licensee to operate in a specific geographic area will serve the 'public interest, convenience, and necessity.'" (*Id.* at 327)

Procedurally, *Radio Relay* stands on all fours with the present case. There the Commission's Order served to "[permit] the entry of wireline carriers [*i.e.*, telephone companies] into the paging industry". (*Id.* at 326) That decision was reviewed. Here the Commission's Order permits AT&T's entry into the overseas record industry.* That final decision, too, should be reviewed.**

This Court apparently deemed the jurisdictional issue in *Radio Relay* so clear that it felt no need to discuss the matter. The assertion of appellate jurisdiction in *Radio Relay* was, and a similar assertion of appellate jurisdiction in this case would be, consistent with established authority.

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* The Commission's Report states, *inter alia:*

> "[W]e conclude that it is no longer appropriate to restrict the use of overseas message telephone service to voice-only. . . . We find this restriction not in the public interest. Accordingly, we are directing the Chief, Common Carrier Bureau, to accept applications from AT&T, pursuant to Section 214 of the Act, 47 U.S.C. 214, to add dataphone-type services to the categories of service for which it may use its overseas facilities, as described herein."

** Here, as in *Radio Relay*, one can no doubt conceive of idiosyncratic reasons why an application for a specific authority might be denied. But to borrow a concept from the jurisprudence of the Clayton Act, AT&T is, under the terms of the present Order, a potential entrant into the overseas record field. Thus it is "in" the market—and "in" in a big way. We don't think AT&T should be "in" at all—and certainly not before the Commission has taken a real look at and judged the overseas record capability which the IRCs are offering to domestic telephone subscribers.

Contrary to intervenors' contentions, an Order's reviewability does not depend upon its status as the last possible pronouncement on a particular subject. *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443, 451 (D.C. Cir. 1974); *Goodman* v. *PSC*, 467 F.2d 375, 377 (D.C. Cir. 1972). Rather, reviewability turns upon a practical evaluation of the appropriateness of the issues presented for judicial review and the hardship of denying immediate review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967); *Toilet Goods Ass'n* v. *Gardner*, 360 F.2d 677, 684 (2d Cir. 1966), *aff'd*, 387 U.S. 158 (1967); *Blanco Oil Co.* v. *FPC*, 485 F.2d 1036, 1038 (D.C. Cir. 1973) ("the touchstone of finality is suitability for judicial review").

Here the Court faces a discrete question—AT&T's status as a carrier eligible *vel non* to haul record traffic from the domestic MTS to overseas points—which has emerged from a distinct and "terminated" Commission procedure. The Commission's decision authorizing AT&T's entry into the overseas record service is a firm predicate for further agency action, not an interlocutory judgment which, in the absence of action by this Court, further agency proceedings may erase. That predicate can and should be reviewed now.

The American Petroleum Institute's ("API's") further claim that the Commission has issued "a mere policy statement, announcing future procedures to be followed by the agency" (API Br. at p. 6) also does not preclude review at this time. *See United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) (reversing an FCC regulation announcing a new television station licensing policy although no specific license application was before the Court); *Citizens Communications Center* v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971) (review of Commission's "Policy Statement on Comparative Hearings Involving Regular Renewal Applicants"); *Phillips Petroleum Co.* v. *FPC*, 475 F.2d 842 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) (review

of procedures promulgated for the conduct of area rate-making proceedings still to be held).

POINT II

Petitioners Did Offer a Service Fully Equivalent to AT&T's Proposal, and the Commission Failed to Consider It

The Commission's Report, as we demonstrated in our earlier brief, analyzed and evaluated the competitive offerings of AT&T and the IRCs in terms of

> "two different services which, by and large, were mutually exclusive—an economy coach version proffered by AT&T and a limited, *de luxe* service, at club car rates, tendered by the IRCs." (RCA Globcom Br. at p. 24)

The Commission quite plainly failed to appreciate that the IRCs proposed to provide, not only specialized extras which AT&T did not offer, but also, through interconnection, a full equivalent of the so-called "basic" service which AT&T sponsored and which the Commission's Report hails as meeting an "unmet need" (JA 6).*

Neither Commission counsel nor AT&T presumes to suggest that the Commission weighed an offer by the IRCs to

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* Thus, the attempt by the Commission (FCC Br. at pp. 28-30) and AT&T (at pp. 18-20 of its brief) to dissociate the interconnection issue from the rest of the case cannot succeed. As RCA Globcom's principal brief points out, the IRCs' equivalent basic service contemplates "interconnections which would enable a telephone subscriber to place a switched record call through an IRC with the same ease with which he placed a conventional telephone call through AT&T's overseas circuits." (RCA Globcom Br. at p. 20) The Commission's failure to confront in its Order the issue of interconnection, which was so central to the IRCs' proposals, and its reluctance to do so now, is, we submit, a powerful indication that the Commission failed to give those proposals proper consideration.

provide a full equivalent of AT&T's proposed "basic" service. Both simply argue that the service offerings of AT&T and the IRCs were different. (FCC Br. at pp. 31-33; AT&T Br. at pp. 14-16) Commission counsel even go so far as to suggest that the IRCs did not present an equivalent service for the FCC's consideration and thus are barred by Communications Act § 405, 47 U.S.C. § 405 (1970), from now mentioning their undisputed capability of doing so. (See FCC Br. at pp. 30-31.)

The first of these contentions is specious, the second wrong—an attempt to rationalize the Commission's failure to address with understanding what was on its desks for three years.

The service offerings of AT&T and the IRCs were not, of course, duplicates of each other. In that sense, they were "different". But they "differed", not because AT&T proposed forms of service to the public which the IRCs did not, but because the IRCs offered everything that AT&T did *plus* more. As AT&T's brief puts it (at p. 14), the IRCs "proposed a different (and superior) service to AT&T's . . ."

The Commission's suggestion that the IRCs did not propose a full equivalent of AT&T's "basic" service is easily answered by reference to the record. ITT Worldcom put it this way in its comments which appear at JA 116:

> "ITT Worldcom would install, at its New York gateway, a computer controlled . . . channel data switch, initially configured as a 4-wire trunk switch. . . . Connection to the AT&T domestic dataphone network [*i.e.*, the MTS system] would be on a 4-wire trunk-to-trunk basis, between the ITT Worldcom New York gateway switch and the designated AT&T international gateway switch.
>
> "Operating arrangements and agreements between ITT Worldcom and domestic carriers of the North American network would be required so that:

"(1) On international dataphone calls, where either operator assistance or a person-to-person connection is required, a number would be established by AT&T in the ITT Worldcom New York gateway which would allow the customer to speak with the ITT Worldcom operator. Then ITT Worldcom could satisfy special customer requirements for international dataphone calls.

"(2) A subscriber of the North American network could initiate an automatic international dataphone connection, subscriber-to-subscriber, with operating practices similar to that now employed in the IDDD* operation."

RCA Globcom's offer to supply "basic" service is set forth at JA 207-09:

"The plan for this service is to provide initially for interconnection capability to existing domestic and foreign switched telecommunications networks in order to provide the overseas transmission facility. RCA Globcom will provide superior transmission capability, as well as special customer features heretofore not available.

. . . .

"This system will have three main entrance points for outbound transmissions from the United States. The first is the entrance from the domestic switched networks (AT&T, WU etc.) where subscribers will have the capability of dialing into the RCA Globcom switch to route their call overseas. . . .

"Regardless of the method of entrance into the switch, the switch will route the call overseas to the foreign terminal via overseas trunk bundles using circuits specifically conditioned for high-speed data transmissions. At the overseas site, the call will be

* "IDDD" refers to "international direct distance dialing".

routed to its ultimate destination through the facilities of our foreign correspondent." *

In other words, RCA Globcom's service offering contemplated that:

"the domestic . . . public switched telephone network . . . be used for overseas switched data calls regardless of which carrier or carriers furnish the overseas facility." (JA 344)

The essential "difference" between these proposals and AT&T's, insofar as meeting the needs of domestic MTS subscribers for an overseas data transmission capability, concerns the proprietorship of the overseas circuits.**

To be sure, RCA Globcom also offered additional specialized features which AT&T did not. But these proposals (see JA 211-17) were plainly depicted as "extras." ***

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* RCA Globcom's proposal also provided for access to its overseas circuits by tieline customers (located, generally in the so-called "gateway cities") and by customers of other domestic broadband services which the Commission permits to operate in the "hinterland". (See JA 207-09 and RCA Globcom Br. at pp. 9-10.) The additional domestic access opportunities available under the IRCs' proposals strike us as another element of their superiority.

** The IRCs' proposals thus provided typical telephone subscribers with an opportunity, equivalent to that offered by AT&T, to "use their ordinary telephone service" to "transmit data" "in the same way when they place an overseas call as they do when they place a call within the continental United States". (AT&T Br. at pp. 2-3) These proposals sought to enhance, no less than AT&T's, what the Commission characterizes as the "flexibility of the public telephone network" for domestic subscribers. (FCC Br. at p. 14)

*** RCA Globcom would expect to tariff these "extras" at rates higher than those for the basic service. (JA 5) But there is nothing unusual about such a pattern. The Court, we submit, may judicially notice that AT&T conventionally charges more for calls which require operator assistance or include special features than it does for the "basic" call which the subscriber dials for himself.

See also the IRCs' reply comments below at JA 296 (ITT Worldcom) and JA 388 (WUI).

AT&T does not join in the Commission's arguments based on Communications Act § 405, perhaps because, in the proceedings below, it had little doubt about what was on the table. Its comments then stated:

> "If the voice carriers provide overseas message data service, they will provide the entire service, including the overseas channel portion of the service, using the worldwide public switched network. If the record carriers provide the service, they will provide the overseas channel portion of the service, and in addition the arrangement to connect those channels with the public switched network. The voice carriers will provide the connecting public switched network. The channel facilities used in either case will be essentially the same, although the record carriers may specially condition for data transmission the channels they use, and both the voice and record carriers may be presumed to have the experience and competence to provide the service." * (JA 162)

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* AT&T's description of the alternatives before the Commission also disposes of Xerox's suggestion (at p. 6 of its brief), not raised by any party below, or suggested in the Commission's Report, that the IRCs lack sufficient broadband analog circuits to supply the new overseas voice/record capability at issue in Docket No. 19558. Broadband analog circuits are the staple circuit of modern telecommunications, are used by all carriers in a wide variety of services, and are available in abundance through both submarine cables and the international communications satellites of the INTELSAT system. (See RCA Globcom Br. at pp. 8-10.) The current availability *vel non* of the IRCs' DATEL services to particular foreign countries is a function, not of circuit availability, but of regulatory and economic constraints. Although the IRCs' DATEL service has obtained a relatively limited commercial acceptance to date, this reflects the Commission's traditional confinement of the IRCs to a small number of "gateway cities" and AT&T's refusal, thus far, to provide its subscribers with convenient access to the IRCs' circuits. (See RCA Globcom Br. at pp. 10-12.)

The IRCs are entitled, we submit, to the Commission's reasoned appraisal of their actual offering. They have not had it.

POINT III

The Commission's Departure From the Policies of *TAT-4* Remains Unjustified

Confronted with the looming presence of *TAT-4, American Tel. & Tel. Co.*, 37 F.C.C. 1151 (1964), the Commission's counsel acknowledges a "tradition" of "voice/record separation" (FCC Br. at pp. 26-27), but urges that the agency's Report has adequately distinguished the prior authority. AT&T, on the other hand, argues at great length that *TAT-4* establishes no policy germane to this case. (AT&T Br. at pp. 23-35) Both contentions are, we submit, unsound.

Commission counsel "distinguish" *TAT-4* from this proceeding by simply repeating, without more, the alleged "distinctions" which the Commission sets out in its Report. (FCC Br. at pp. 15 n.18, 27) These "distinctions" are based fundamentally on the Commission's invalid assumption about the nature of the IRCs' basic service offerings.* RCA Globcom's critique of those distinctions in its principal brief (at pp. 33-35) remains unanswered, and we stand on it.**

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* *See Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C.Cir. 1971), where the Court explained, in reversing the FCC:

> "In an apparent effort to avoid a direct confrontation with its earlier ruling . . . the Commission adopted a wholly unreasonable view of the factual setting of this controversy." (*Id.* at 1027)

** The Commission notes, of course, that the carrier interconnection proposed by the IRCs implies some equipment costs. Our earlier brief deals with this supposed "distinction" of *TAT-4*. We would add that the Commission has, on other occasions, ex-

AT&T suggests three reasons of "policy" for reading *TAT-4* out of this case. It argues, first, that *TAT-4* addresses "competitive" private line services. This proceeding, by contrast, concerns the "monopoly" services which AT&T offers through the domestic MTS. (AT&T Br. at p. 24; see also *id.* at p. 9)

But neither the Commission's Report in this case nor the Commission's decision in *TAT-4* attempts to explain either the Commission's adherence to, or its departure from, the "tradition" of "voice/record separation" in terms of an alleged dichotomy between "competitive" and "monopoly" services. AT&T cannot, of course, write the Commission's opinions. It can only defend them on their own terms.

And, in those terms, this case and *TAT-4* are not different, but similar. Both involve the introduction of a new overseas service, not heretofore available, which can be provided either by an interconnection of AT&T's domestic facilities with its overseas facilities or by an interconnection of its domestic facilities with the IRCs' overseas facilities. Now, as in *TAT-4*, AT&T's overwhelming advantages in domestic distribution should require the exclusion of AT&T from the overseas record arena. Moreover, overseas record services have traditionally been provided by the competitive IRCs. Whether or not such services originate on the domestic MTS, they are certainly not "monopoly" services.

Secondly, AT&T invites attention to a supposed Commission policy "favoring Use of MTS for DATA-PHONE

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cluded interconnection costs from its public interest calculus. *See Bell System Tariff Offerings*, 46 F.C.C.2d 413, 429, *aff'd sub nom. Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) (denying AT&T hearing on costs imposed by direction to interconnect with facilities of domestic specialized carriers).

transmission". (AT&T Br. at p. 28) As evidence of this purported "policy" it offers its record services to Hawaii, originating with the so-called *HAW-1* decision, *American Tel. & Tel. Co.*, 44 F.C.C. 602 (1955). It cites, as well, to certain overseas record services which it long ago was authorized to provide to the Department of Defense.

But, as the Commission's brief points out, the "mainland-to-Hawaii route" is "unique". (FCC Br. at p. 6) The Commission's opinion in *HAW-1* makes clear that that decision stemmed from an unusual request by the Government's defense agencies. In the immediate aftermath of the Korean War, the latter sought the construction of a cable to Hawaii, which would serve various military needs, but which could not be justified, as a commercial venture, by the levels of voice traffic then obtaining to the islands. AT&T agreed to lay the cable and obtained, in *HAW-1*, the authority to carry record traffic to Hawaii when it demonstrated that the project's economic feasibility required the cable's use for both voice and record services.

The Commission has since recognized on at least two occasions that *HAW-1's* grant of authority to AT&T had been a *sui generis* case, see *RCA Global Communications, Inc.*, 37 F.C.C.2d 1043, 1048 (1972), *rev'd on other grounds sub nom. Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974); *American Tel. & Tel. Co.-Dataphone*, 1 F.C.C.2d 374, 375 (1965), based on special circumstances which no longer exist, *see RCA Global Communications, Inc., supra*, 37 F.C.C.2d at 1048.

In *TAT-4*, when the Commission generally excluded AT&T from the provision of overseas private line AVD services, it "grandfathered" AT&T's existing overseas record services to the military. (37 F.C.C. at 1160-61) AT&T's experiences serving Hawaii and the Pentagon do not, it seems, impeach *TAT-4* in the slightest.

Finally, AT&T purports to find comfort in such cases as *Hush-A-Phone Corp.* v. *United States,* 238 F.2d 266 (D.C. Cir. 1956), and *Carterfone,* 13 F.C.C.2d 420, *reconsideration denied,* 14 F.C.C.2d 571 (1968). (See AT&T Br. at p. 27.) In *Hush-A-Phone* the Court struck down an AT&T policy which sought to prevent telephone subscribers from using end-line equipment which, though compatible with the telephone system's technical integrity, had not been supplied by AT&T. The Court held that there should be no "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." (238 F.2d at 269) *Carterfone* is an analogous decision at the Commission level.

The present relevance of all of this is, for us at least, difficult to discern. If significant at all, *Hush-A-Phone* and its progeny would seem to point against AT&T's continued resistance to an adequate interconnection with the IRCs. AT&T's labored efforts to avoid *TAT-4* is a persuasive indication that the Commission has not rationally justified its *de facto* repudiation of its earlier decision.

POINT IV

The Commission Did Not Adequately Consider Relevant Antitrust Policies

In reaching the decision to allow AT&T, armed with a unique access to the domestic MTS, to enter the overseas record business, the Commission did not, we submit, properly assess the antitrust considerations posed by the IRCs in the record below. It did not explain why the public interest would be enhanced by AT&T's prospective domination of a market currently served by several vigorous, competing carriers. (See RCA Globcom Br. at pp. 37-43.)

In an attempt to respond to this critique, Commission counsel attacks straw men. RCA Globcom does not argue, as the agency would have it,

> "(1) that competitive considerations override all other matters in determining where the public interest lies; and (2) that the only adequate safeguard when competitive problems arise is to deny altogether the authorization that is questioned." (FCC Br. at pp. 22-23)

Rather we urge that antitrust policy was left out of the agency's public interest calculus and should not have been. "Competitive considerations" are not, to be sure, the be-all and end-all. They may be "overridden" in an appropriate case. But they may not be ignored or circumvented.

Commission counsel's attempt, in brief, to explicate the Report's rationale lays bare the inadequacy of the agency's antitrust analysis. The Commission's argument boils down to this: "[t]he Commission here weighed the IRCs' competition arguments along with other considerations, and concluded that its duty to satisfy an unmet need for communications services . . . was 'overriding.'" (FCC Br. at p. 24)

To begin with, the Commission's decision satisfies no "unmet need" which could not have been supplied, as well or better, by the IRCs. Here, as in *TAT-4,* the Commission was provided with a choice of ways by which to make a new voice/record service available to the American public. The Commission elected in the present case to authorize AT&T to advance from its unparalleled domestic distribution base into the overseas record market. But equally, as in *TAT-4,* the Commission could have excluded AT&T from the overseas record arena and required it to interconnect with the competitive IRCs. Thus, the only plausibly suggested counter to the "IRCs' competition arguments"—*viz.,* the need to meet an "unmet need"—is mythical.

Second, how did the Commission "weigh" the "IRCs' competition arguments"? It is apparent that those arguments did not convince the agency. But why? A court should not affirm on the assumption that the Commission has, *in pectore*, some "undisclosed awareness" of the issues. See *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 95 n. 6 (1953). The agency, if it is to be sustained, must articulate that awareness.

The Commission's approach here, where it mentions the IRCs' "competition arguments" only to dismiss them out-of-hand (JA 7), is to be contrasted with the Commission's sophisticated discussion of antitrust implications in such cases as *Allocation of Frequencies in 150.8-162 Mc/s Band*, 9 F.C.C. 2d 659 (1967), 12 F.C.C. 2d 841, 845-51, *reconsideration denied*, 14 F.C.C. 2d 269 (1968), *aff'd sub nom. Radio Relay Corp.* v. *FCC*, 409 F.2d 322 (2d Cir. 1969), and *National Ass'n of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 96 S. Ct. 2203 (1976).

In *Radio Relay* the independent paging services faced the prospect of the telephone companies' expansion into their field. Unlike this case, the smaller competitive operators could not meet all of the public demand for such paging services. *See Allocation of Frequencies, supra*, 9 F.C.C. 2d at 662. Nevertheless, the Commission analyzed at length the independents' "competition arguments". Indeed, it requested a special round of briefing addressed to that very point. See *Radio Relay, supra*, 409 F.2d at 325.

This Court observed in its affirmance in *Radio Relay* that the Commission had given "much attention and consideration to the potential competitive effects of its rule." (*Id.* at 327) It seems to us inconceivable that anyone could say the same about the Report now before the Court. And, because one cannot, the Commission's decision should be vacated.

POINT V

Petitioners Did Not Receive An Adequate Hearing

The Commission employed in Docket No. 19558 a bare-bones "notice-and-comment" procedure. It collected two rounds of written comments in early 1973, took no action for some three years while the membership of the Commission and the staff of the Common Carrier Bureau changed and then, without more, decreed. The procedure followed was the minimum permissible under any reading, however cramped and mechanical, of the Administrative Procedure Act.

RCA Globcom's principal brief demonstrates (at pp. 43-49) that the agency's mode of operation provided an insufficient address to the issues presented for decision by the present record. The Commission and AT&T now argue that Docket No. 19558 was not an adjudicatory proceeding, but a rule-making; thus "notice-and-comment" will do. Besides, a full-scale hearing would have been too cumbersome. (See FCC Br. at pp. 33-34; AT&T Br. at pp. 43-44.)

These "answers" by the Order's proponents miss the point. The cases cited in our earlier brief, see, *e.g.*, *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1253-54 (D.C. Cir. 1973); *City of Chicago* v. *FPC*, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972), make it clear that the APA ordains, not a series of watertight procedural compartments, but a spectrum. The decisional mechanics should be a function of—and, in the words of *City of Chicago*, the hearing mechanisms must be "realistically tailor[ed]" (*id.* at 744) to—the issues presented. From this perspective Docket No. 19558 was not a polar case, and it should not have been so treated.

The record below raises seriously disputed issues about the effect of this decision upon competition and the fate of the IRCs' other record services. They warrant more

examination than was possible with a bare two rounds of comments responsive to a plethora of Commission questions—19 in all* (JA 14-15). It is a distortion to suggest, as AT&T does (AT&T Br. at p. 43), that the IRCs have demanded, or insist upon the imperative necessity of, a trial-type hearing. There are many techniques available which would bring into a focus adequate for informed judgment the matters which are in sharp controversy here. *See Marine Space Enclosures, Inc.* v. *FMC*, 420 F.2d 577, 589 (D.C. Cir. 1969). The FCC employed one of the simplest and most obvious in the docket which gave rise to *Radio Relay Corp.* v. *FCC*, 409 F.2d 322 (2d Cir. 1969) —a separate round of briefing and comment directed to the clarification of the competitive issues which emerged in the parties' initial filings in that proceeding (see *id.* at 325).

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* Noting that the IRCs' telex revenues in the mainland-Hawaii service grew between 1965 and 1973 despite the contemporaneous availability of DATA-PHONE transmissions over that route, AT&T draws the conclusion that the IRCs are "crying 'wolf' " when they see themselves as harshly affected by the present Commission decision. (AT&T Br. at p. 41) But AT&T's implication that a dated Hawaiian analogy is applicable, or is even likely to be applicable, to other places and later times is not self-evident. It is an assertion of complex fact which, if significant to the agency's judgment, should have been subject to careful test.

How, for example, does the cited revenue datum relate to the further fact, well documented in the record (see JA 22-27), but ignored by AT&T, that the distribution of modems—the end-line devices needed to send and receive record transmissions over telephone lines—is mounting year-by-year? The piston-powered commercial airliner undoubtedly enjoyed its best, and growing, revenues in the years between the first appearance of and the general availability of jets. How is the significance of the cited *revenue* figures affected by (a) Hawaii's status as a principal headquarters and support base, between 1965 and 1973, for a war in Southeast Asia; (b) inflationary trends during the same period; and (c) other factors? The question of the effect of the Commission's present decision on other overseas record services warrants a good deal more attention than the superficial treatment it has received.

Whether it is the province of this Court to tell the Commission which of the possible techniques it should use to make a record fit for an informed agency judgment is beside the point. On this record, this Court can and should hold that the Commission should not have discarded them all.

There are, so far as we can see, no problems of manageability in this docket at all comparable to those of *WBEN, Inc.* v. *United States*, 396 F.2d 601 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968), and *California Citizens Band Ass'n* v. *United States*, 375 F.2d 43 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967)—cases in which hundreds, even thousands, had views to present to the agency and in which the petitioners were insisting on future procedural redundancy. This case is a controversy with, in substance, only two sides. Yet, the Commission has not provided, even once, the means for adequately exploring the issues before it.

CONCLUSION

For the reasons stated in this brief and in RCA Globcom's principal brief, the Commission's Report and Order should be vacated and set aside.

Respectfully submitted,

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Dated: September 27, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS INC. RCA GLOBAL COMMUNICATIONS, INC., and WESTERN UNION INTERNATIONAL, INC.,	:	
Petitioners,	:	
v.	:	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	:	
Respondents.	:	Docket Nos. 76-4049 76-4061 76-4074
-and-	:	
AMERICAN TELEPHONE & TELEGRAPH COMPANY, XEROX CORPORATION, HAWAIIAN TELEPHONE COMPANY, AMERICAN PETROLEUM INSTITUTE,	:	
Intervenors.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have caused the enclosed Reply Brief for Petitioner RCA Global Communications, Inc. to be served today upon the following by mailing two copies thereof, first-class mail, postage prepaid on this 27th day of September, 1976:

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